

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVOOD KHADEMI,

Plaintiff,

V.

SOUTH PLACER CO. JAIL, et al.,

Defendants.

No. 2:21-cv-1498 KJM DB P

ORDER AND FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding pro se with a civil rights action. Before the court are plaintiff's first amended complaint for screening, a request for the appointment of counsel and an investigator, a motion to consolidate this case with another case pending in this district, and a request for preliminary injunctive relief. Below, this court finds plaintiff has stated a cognizable claim against defendants Waskowiak and Carelton for excessive force but has failed to state any other claims. Plaintiff will be given an opportunity to either amend his first amended complaint or proceed on the cognizable claim in his current complaint. In addition, this court denies plaintiff's motions for the appointment of counsel and an investigator and for case consolidation. Finally, this recommends plaintiff's request for preliminary injunctive relief be denied.

BACKGROUND

Plaintiff alleges misconduct by numerous officers and others between February and May 2021 when he was in custody at the South Placer County Jail (“Jail”). He states that some of the alleged misconduct took place while he was a pretrial detainee and some took place after he was

1 convicted. The date of conviction appears to be April 27, 2021. On May 28, 2021, plaintiff was
2 transferred to state prison.¹ On January 21, 2022, plaintiff was transferred to Atascadero State
3 Hospital.

4 Plaintiff filed his original complaint on August 20, 2021. (ECF No. 1.) On screening, this
5 court found plaintiff failed to state a claim for relief cognizable under 42 U.S.C. § 1983. Plaintiff
6 was given the opportunity to file an amended complaint.

7 On December 1, 2021, plaintiff filed a motion to appoint counsel and an investigator and
8 to consolidate this case with another case pending in this district. (ECF No. 15.) On December
9 10, plaintiff filed a motion for preliminary injunctive relief and again asked for case
10 consolidation. (ECF No. 16.) On December 27, plaintiff filed a first amended complaint. (ECF
11 No. 18.) Below, this court screens plaintiff's first amended complaint and addresses his pending
12 motions.

13 SCREENING

14 As described in this court's prior screening order, the court is required to screen
15 complaints brought by prisoners to determine whether they sufficiently state claims under 42
16 U.S.C. § 1983. 28 U.S.C. § 1915A(a). The prisoner must plead an arguable legal and factual
17 basis for each claim in order to survive dismissal. Franklin v. Murphy, 745 F.2d 1221, 1227-28
18 (9th Cir. 1984). In addition, the prisoner must demonstrate a link between the actions of each
19 defendant and the deprivation of his rights. Monell v. Dept. of Social Servs., 436 U.S. 658
20 (1978). "A person 'subjects' another to the deprivation of a constitutional right, within the
21 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or
22 omits to perform an act which he is legally required to do that causes the deprivation of which
23 complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

24 I. First Amended Complaint

25 Plaintiff identifies the following defendants, all of whom were employed at the South
26 Placer County Jail: Officials/Officers Bailar, Waskowiak, Giovanaetti, Wooden, Lawica, Walker,

27 ¹ This court has pieced together plaintiff's apparent detention history from plaintiff's filings and
28 court records.

1 Bertoni, Kennedy, Carelton, and Cemina; Nurse Stive; and an unnamed dentist. Plaintiff's
2 allegations are somewhat difficult to discern. As best this court can tell, plaintiff alleges the
3 following. Regarding his criminal conviction, he complains that he was denied the right to a
4 speedy trial and his plea agreement was not voluntary. Regarding the conditions of his
5 confinement at the Jail, plaintiff makes a number of allegations:

6 1. In February 2021, he was denied sufficient water because the water supply to his cell
7 was shut off. He states that medication he takes requires sufficient water to avoid side effects.
8 Plaintiff told defendants Giovanaetti and Wooden about his need for water and they failed to
9 "take reasonable measure to abate the substantial risk of serious harm" to plaintiff. He suffered
10 internal bleeding and an infection as a result.

11 2. Defendants Lawica, Walker, and Bertoni searched plaintiff's cell several times.
12 Defendant Lawica conducted a cell search and falsely accused plaintiff of having a "pill." That
13 accusation resulted in plaintiff receiving less pain medication.

14 3. On May 23, defendants Waskowiak, Kennedy and a third officer (the court is unable to
15 read that officer's name) used "unnecessary" force on plaintiff. Defendant Wooden then directed
16 defendant Waskowiak and "Carelton"² to place plaintiff in handcuffs using force. Those officers
17 then used excessive force by pressing plaintiff's cuffed hands into his waist. Defendant Kennedy
18 observed what happened and failed to intervene. As a result, plaintiff suffered swollen arms and
19 wrists, and bruising

20 4. Also on May 23, plaintiff was denied water to take his pain medication.

21 5. On May 24, several defendants pepper-sprayed him unnecessarily.

22 6. The warden and Giovanaetti kept plaintiff in the Security Housing Unit and
23 Administrative Segregation for prolonged periods of time. While housed in those units, plaintiff
24 was denied programming, exercise, and medical care. He also lost good time credits.

25 7. Defendant Stive failed to provide appropriate medical care.

26 8. The unnamed dentist failed to provide appropriate medical care.

27 ² While plaintiff does not identify Carelton as a defendant in the initial part of his complaint, he
28 refers to Carelton as a defendant here and this court will consider Carelton as such.

1 **II. Does Plaintiff State any Cognizable Claims for Relief?**

2 This court finds that plaintiff states one potential claim for relief – that defendants
3 Waskowiak and Carelton used excessive force in violation of the Eighth Amendment.³ Plaintiff's
4 remaining allegations are not, sufficient to state claims for relief.

5 First, plaintiff's claims that he was denied water are not sufficiently specific. Simply
6 stating a legal conclusion, for example, that defendants failed to take "reasonable measures," does
7 not explain what those defendants did. To meet the Eighth or Fourteenth Amendment standard
8 for stating a claim, plaintiff must allege facts showing: (1) just what each defendant did to deny
9 plaintiff water and for how long; (2) that each defendant knew denying plaintiff water for that
10 amount of time would result in a substantial risk that plaintiff would suffer a serious harm; (3)
11 what that harm was; (4) that each defendant knew what the harm was; and (5) that there was no
12 legitimate reason to deny plaintiff water. Farmer v. Brennan, 511 U.S. 825, 847 (1994); Castro v.
13 Cty. of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016).

14 Second, besides his claim that Waskowiak and Carelton used excessive force in cuffing
15 him, plaintiff fails to state any other claims for excessive force. To state an Eighth Amendment
16 claim for excessive force, plaintiff must allege facts showing: (1) specifically what each
17 defendant did; (2) that each defendant took that action knowing it was substantially likely to
18 cause plaintiff harm; (3) that each defendant was deliberately indifferent to that harm; (4) that
19 there was no legitimate reason for each defendant's actions; and (5) that the actions caused
20 plaintiff harm. Wilkins v. Gaddy, 559 U.S. 34, 37 (2010).

21 Third, plaintiff's allegations that defendants Stive and the dentist failed to provide medical
22 care are too vague. If plaintiff was a convicted prisoner when those incidents occurred, he must
23 attempt to state a claim under the Eighth Amendment. To do so, plaintiff must allege facts
24 showing: (1) in detail, just what each defendant did; (2) that each defendant knew their conduct
25 was substantially likely to cause plaintiff serious harm; (3) that each defendant was deliberately
26 indifferent to that risk of harm; and (4) that plaintiff suffered harm. See Estelle v. Gamble, 429

27

28 ³ This court looks to the Eighth Amendment standard for plaintiff's excessive force claims
because the incidents appear to have occurred after plaintiff was convicted.

1 U.S. 97, 106 (1976). If plaintiff was a pretrial detainee when those incidents occurred, he must
2 allege facts showing a denial of his rights under the Fourteenth Amendment. Specifically,
3 plaintiff must allege facts showing: (1) in detail, just what each defendant did; (2) that each
4 defendant's conduct was unreasonable; (3) that plaintiff had a serious medical need; (4) that each
5 defendant knew of that need; and (5) that plaintiff suffered harm. See Gordon v. Cnty. of Orange,
6 888 F.3d 1118, 1120, 1124-25 (9th Cir. 2018).

7 Some of plaintiff's allegations do not state a constitutional claim. Plaintiff's assertion that
8 defendant Lawica falsely claimed plaintiff had a pill in his cell does not state any sort of
9 constitutional violation. If plaintiff is alleging that Lawica did so intentionally to cause plaintiff
10 to be deprived of pain medication, then plaintiff may be able to state a claim that Lawica was
11 deliberately indifferent to his serious medical needs.

12 Plaintiff's claim that his placement in segregated housing units caused numerous
13 deprivations also fails to amount to a constitutional violation. Plaintiff can only state a claim that
14 the procedures used to place him there violated his rights if he first shows that placement in
15 segregated housing was an "atypical and significant hardship." Sandin v. O'Connor, 512 U.S.
16 472, 485 (1995). Courts have found the conditions of segregated housing met that standard only
17 when the conditions were unusual and extreme. See, e.g., Brown v. Oregon Dept. of Corrs., 751
18 F.3d 983, 988 (9th Cir. 2014) (27 months in solitary confinement without most privileges
19 afforded inmates in the general population was atypical and significant). The conditions plaintiff
20 alleges are typical of segregated housing so do not amount to an atypical and significant hardship.

21 To the extent plaintiff is trying to challenge his court proceedings and conviction, he may
22 not raise those issues in this case. "[H]abeas corpus is the appropriate remedy" for such claims.
23 See Wilkinson v. Dotson, 544 U.S. 74, 78 (2005) ("[A] prisoner in state custody cannot use a §
24 1983 action to challenge "the fact or duration of his confinement.'" (citations omitted)); see also
25 Nettles v. Grounds, 830 F.3d 922, 933 (9th Cir. 2016) ("[H]abeas corpus is the exclusive remedy
26 to attack the legality of the conviction or sentence.").

27 Finally, plaintiff is advised that the use of an unnamed or "Doe" defendant is not favored.
28 See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980); Wakefield v. Thompson, 177 F.3d

1 1160, 1163 (9th Cir. 1999); Lopes v. Viera, 543 F. Supp. 2d 1149, 1152 (E.D. Cal. 2008). If
2 plaintiff wishes to pursue a claim against the unnamed dentist, he must make every effort to
3 determine the identity of that defendant prior to filing an amended complaint.

4 **III. Conclusion**

5 Above, this court finds plaintiff states one potential claim for relief – that defendants
6 Waskowiak and Carelton used excessive force when they cuffed him on May 23, 2021. This
7 court further finds plaintiff fails to state any other claims for relief under 42 U.S.C. § 1983.

8 Plaintiff has a choice. He may proceed on his excessive force claim against Waskowiak
9 and Carelton or he may amend his complaint to attempt to also state other claims. Plaintiff is
10 warned that in any amended complaint he must include ALL claims he wishes to proceed on in
11 this action.

12 If plaintiff chooses to file a second amended complaint, he must address the problems
13 with his first amended complaint that are explained above. Plaintiff is advised that in an amended
14 complaint he must clearly identify each defendant and the action that defendant took that violated
15 his constitutional rights. The court is not required to review exhibits to determine what plaintiff's
16 charging allegations are as to each named defendant. If plaintiff wishes to add a claim, he must
17 include it in the body of the complaint. The charging allegations must be set forth in the amended
18 complaint so defendants have fair notice of the claims plaintiff is presenting. That said, plaintiff
19 need not provide every detailed fact in support of his claims. Rather, plaintiff should provide a
20 short, plain statement of each claim. See Fed. R. Civ. P. 8(a).

21 Any amended complaint must show the federal court has jurisdiction, the action is brought
22 in the right place, and plaintiff is entitled to relief if plaintiff's allegations are true. It must
23 contain a request for particular relief. Plaintiff must identify as a defendant only persons who
24 personally participated in a substantial way in depriving plaintiff of a federal constitutional right.
25 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation
26 of a constitutional right if he does an act, participates in another's act or omits to perform an act
27 he is legally required to do that causes the alleged deprivation). "Vague and conclusory
28 allegations of official participation in civil rights violations are not sufficient." Ivey v. Bd. of

1 Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

2 In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed.
3 R. Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a single defendant. Fed.
4 R. Civ. P. 18(a). If plaintiff has more than one claim based upon separate transactions or
5 occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

6 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d
7 1119, 1125 (9th Cir. 2002) (noting that “nearly all of the circuits have now disapproved any
8 heightened pleading standard in cases other than those governed by Rule 9(b)’’); Fed. R. Civ. P.
9 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff’s claims must be
10 set forth in short and plain terms, simply, concisely and directly. See Swierkiewicz v. Sorema
11 N.A., 534 U.S. 506, 514 (2002) (“Rule 8(a) is the starting point of a simplified pleading system,
12 which was adopted to focus litigation on the merits of a claim.”); Fed. R. Civ. P. 8.

13 An amended complaint must be complete in itself without reference to any prior pleading.
14 E.D. Cal. R. 220. Once plaintiff files an amended complaint, the original pleading is superseded.
15 By signing an amended complaint, plaintiff certifies he has made reasonable inquiry and has
16 evidentiary support for his allegations, and for violation of this rule the court may impose
17 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

18 **REQUEST FOR THE APPOINTMENT OF COUNSEL AND INVESTIGATOR**

19 Plaintiff states that he is disabled and indigent. He argues that his plea deal was not
20 voluntary and the district attorney withheld evidence from the defense. Plaintiff further states that
21 he was assaulted by officials at Salinas Valley State Prison in late 2021, which, he appears to
22 allege, caused head trauma. Plaintiff complains that he has limited access to resources. (ECF No.
23 15.)

24 The United States Supreme Court has ruled that district courts lack authority to require
25 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490
26 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the
27 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
28 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

The test for exceptional circumstances requires the court to evaluate the plaintiff's likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances common to most prisoners, such as lack of legal education, limited law library access, and indigency, do not establish exceptional circumstances that would warrant a request for voluntary assistance of counsel. In the present case, the court does not find the required exceptional circumstances.

9 Plaintiff asks that if the court deny his request for counsel, he be appointed an
10 investigator. As plaintiff has been informed previously, this court is not authorized to appoint a
11 court-funded investigator for him. See Tedder v. Odel, 890 F.2d 210 (9th Cir. 1989); 28 U.S.C. §
12 1915.

MOTION FOR CONSOLIDATION

14 It is not clear why plaintiff seeks consolidation of the present case with Khademi v.
15 Roseville Police Dept., 2:21-cv-0966 JAM DMC P. (ECF Nos. 15, 16.) His case against the
16 Roseville Police Department and others involves different conduct by different defendants.
17 Because these cases do not share common questions of law or fact, this court finds no basis upon
18 which to consolidate them.

MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

20 Plaintiff filed this motion in both the present case and in Khademi v. Roseville Police
21 Dept., 2:21-cv-0966 JAM DMC P. He alleges a wide variety of misconduct. Among other
22 things, he challenges conduct that occurred when he was transferred to, and during his
23 incarceration at, North Kern State Prison, conduct that involved a 2017 assault, and the denial of a
24 habeas corpus petition he had in this court. As best this court can tell, plaintiff seeks some sort of
25 court proceeding regarding his habeas case. (ECF No. 16.)

26 A party requesting preliminary injunctive relief must show that “he is likely to succeed on
27 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
28 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*

1 Natural Res. Def. Council, 555 U.S. 7, 20 (2008). The propriety of a request for injunctive relief
2 hinges on a significant threat of irreparable injury that must be imminent in nature. Caribbean
3 Marine Serv. Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988).

4 The principle purpose of preliminary injunctive relief is to preserve the court's power to
5 render a meaningful decision after a trial on the merits. See 11A Charles Alan Wright & Arthur
6 R. Miller, Federal Practice and Procedure § 2947 (3d ed.). Implicit in this required showing is
7 that the relief awarded is only temporary and there will be a full hearing on the merits of the
8 claims raised in the injunction when the action is brought to trial.

9 To the extent plaintiff seeks a hearing regarding his habeas corpus petition, that request
10 bears no relationship to the present case. If the court granted plaintiff's request, it would not
11 affect the proceedings in this § 1983 action against defendants at the South Placer County Jail.
12 To extent plaintiff seeks some other sort of injunction regarding his treatment in the Jail or state
13 prison system, because plaintiff is no longer incarcerated in jail or prison, any injunctive relief
14 against the defendants in this case would have no effect on plaintiff's present circumstances.

15 Accordingly, this court will recommend plaintiff's motion for preliminary injunctive relief
16 be denied.

17 For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED as
18 follows:

- 19 1. Plaintiff has stated a cognizable Eighth Amendment excessive force claims against
20 defendants Waskowiak and Carelton.
- 21 2. Plaintiff's remaining claims in the first amended complaint are dismissed with leave to
22 amend.
- 23 3. Plaintiff may choose to proceed on his cognizable claim set out above or he may choose
24 to amend his first amended complaint.
- 25 4. Within thirty days of the filed date of this order, plaintiff shall fill out and return the
26 attached form indicating how he would like to proceed in this action.
- 27 5. Plaintiff's motion for the appointment of counsel and an investigator (ECF No. 15) is
28 denied.

1 6. Plaintiff's motion for consolidation (ECF Nos. 15, 16) is denied.

2 7. Plaintiff is warned that his failure to comply with this order will result in a
3 recommendation that this action be dismissed.

4 Further, IT IS RECOMMENDED that plaintiff's motion for preliminary injunctive relief
5 (ECF No. 16) be denied.

6 These findings and recommendations will be submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within thirty days after
8 being served with these findings and recommendations, plaintiff may file written objections with
9 the court. The document should be captioned "Objections to Magistrate Judge's Findings and
10 Recommendations." Plaintiff is advised that failure to file objections within the specified time
11 may result in waiver of the right to appeal the district court's order. Martinez v. Ylst, 951 F.2d
12 1153 (9th Cir. 1991).

13 Dated: March 8, 2022



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15 DEBORAH BARNES
16 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVOOD KHADEMI,

Plaintiff,

v.

SOUTH PLACER CO. JAIL, et al.,

Defendants.

No. 2:21-cv-1498 KJM DB P

PLAINTIFF'S NOTICE ON HOW TO
PROCEED

Check one:

Plaintiff wants to proceed immediately on his claim in the first amended complaint that defendants Waskowiak and Carelton used excessive force in violation of the Eighth Amendment when they used handcuffs on him on May 23, 2021. Plaintiff understands that by going forward without amending the first amended complaint he is voluntarily dismissing all other claims.

Plaintiff wants to amend the first amended complaint.

DATED: _____

Plaintiff Davood Khademi, Pro Se